

Court Appointed Attorney

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Court Appointed Attorney

3-01 DEFENDANT'S RIGHT TO COURT APPOINTED ATTORNEY

A. Authority

At the arraignment on the warrant or complaint, the court must advise the defendant of the right to a court appointed attorney at all subsequent court proceedings if s/he wants one and is unable to pay for one. [MCL 775.16; MSA 28.1253, MCR 6.005(A)]

B. When Entitled

1. Pretrial Proceedings

a. Felony Cases

Even if a defendant waives the assistance of an attorney, the record of each subsequent proceeding (such as the preliminary examination, arraignment, revocation proceedings, hearings, trial, or sentencing) must affirmatively show that the court advised the defendant of the right to an attorney and that the defendant waived that right. Before the court begins such proceedings, the defendant must reaffirm that an attorney is not wanted, or if the defendant requests an attorney and is unable to pay for one, the court must appoint one, or if the defendant wants to hire an attorney and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one. [MCR 6.005(E)]

At the arraignment on the warrant or complaint, the court must advise the defendant of the right to a court appointed attorney if s/he does not have the money to hire one. The court must also advise the defendant of the right to an attorney at all subsequent court proceedings, and if appropriate, appoint one. [MCR 6.104(E) and MCR 6.610(G)]

b. Misdemeanor Cases

At the arraignment on the warrant or complaint, the court must advise the defendant of the right to a court appointed attorney if s/he does not have the money to hire one and if:

- 1) the offense charged requires on conviction a minimum term in jail; or
- 3) the court determines that it might sentence the defendant to jail.

[MCR 6.610(D) and (E), Mich Sup Ct AO 1972-4]

2. Sentencing

Immediately after imposing sentence in felony cases, the court must advise the defendant that s/he is entitled to appellate review of the conviction and sentence and that the court will appoint an attorney to represent the defendant on appeal if s/he is unable to pay for one. [MCR 6.425(E) and (F)]

3. Post Sentencing Proceedings

a. Probation Violation

At the arraignment on an alleged probation violation, the court must advise the probationer that s/he is entitled to the assistance of a court appointed attorney at the hearing and at all subsequent court proceedings and that one will be appointed if s/he is unable to pay for one. [MCR 6.445(B)] Even if a probationer charged with probation violation waives the assistance of an attorney, at each subsequent proceeding the court must comply with the advise and waiver procedure in MCR 6.005(E). [MCR 6.445(D)]

b. Postappeal Relief

In any felony case, if a defendant requests an appointed attorney for proceedings in postappeal relief, and the court has determined that the defendant is indigent, the court must appoint an attorney for the defendant at any time during the proceedings. [MCR 6.505]

3-02 INVESTIGATION TO DETERMINE INDIGENCY

A. Role of Judge

In all Michigan courts the final decision to provide counsel for an indigent defendant lies with the judge having jurisdiction in the pending case. In some courts the presiding judge will make a determination of indigency and, based upon information provided, appoint an attorney to represent a defendant. If the court determines that the defendant is financially unable to retain counsel, it must promptly appoint an attorney and notify that attorney of the appointment. The court may not permit the defendant to waive the right to be represented without first:

1. advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
2. offering the defendant the opportunity to consult with an attorney.

B. Role of Court Staff

Some courts refer a defendant to an investigator who will examine and verify information contained in a petition for a court appointed attorney. A recommendation for or against appointment of counsel is then provided to the judge.

3-03 APPLICATION FOR INDIGENCY

A. Authority

If the defendant requests an attorney and claims financial inability to retain one, the court must determine whether the defendant is indigent. [MCR 6.005(B) and Mich Sup Ct AO 1972-4, People v Studaker, 387 Mich 698; 199 NW2d 177 (1972)] The appointment of counsel must be consistent with an adopted and published plan which governs the process for selecting and appointing attorneys to represent indigent defendants. [MCL 775.16; MSA 28.1253, MCR 6.005(I)]

B. Process

The process for determining indigency in felony cases is MCR 6.005. In misdemeanor cases, it is Mich Sup Ct AO 1972-4. These factors are a guide for determining indigency and are the minimum amount of information necessary to make an informed decision on the question of indigency. Every court shall require a defendant claiming indigency to submit a sworn statement setting forth his or her financial condition. The defendant shall provide, at a minimum, the following factors:

1. present employment, earning capacity and living expenses;
2. outstanding debts and liabilities, secured and unsecured;
3. whether defendant has qualified for and is receiving any form of public assistance;
4. availability of any personal or real property owned and whether it would cause undue financial hardship to the defendant or dependents if converted;
5. any other circumstances which would impair the ability to pay an attorney's fee as would ordinarily be required to retain competent counsel.

C. SCAO Approved Forms

1. The following form should be completed for appointments through sentencing:
 - a. Petition and Order for Court Appointed Attorney (SCAO Form MC 222)
2. The following forms may be completed for appeals:
 - a. Claim of Appeal (MC 55)
 - b. Bond on Appeal (MC 56)
 - c. Order of Transmittal/Certification of Records to Transmit Record on Appeal (MC 57)

(See the Section 3 Appendix for copies of the forms.)

3-04 RECOVERING EXPENSE

A. Authority

1. Reimbursement After Sentencing

The authority for recovering costs is in MCL 769.3; MSA 28.1075 and MCL 771.3; MSA 28.1133.

Under MCL 769.3, costs of prosecution can be ordered as a condition of sentence only if the offense is punishable by the option of either fine or imprisonment. If a charge is punishable only by imprisonment, costs cannot be imposed. [People v Tims, 127 Mich App 564; 339 NW2d 488 (1983)]

Under MCL 771.3 costs are authorized as a condition of probation only. In addition, costs as a condition of probation are limited by the defendant's ability to pay. [People v Lambert, 151 Mich App 328; 390 NW2d 2 (1986)]

Aside from the provisions of MCL 769.3, some courts hold that reimbursement can be ordered only if a probation order is entered because of the absence of express authority for reimbursement. Other courts hold that reimbursement can be ordered without a probation order because there is no express authority prohibiting it. According to People v Neil, 99 Mich App 677; 299 NW2d 23 (1980) a term or condition of a sentence not expressly authorized by statute is unlawful and must be vacated. It is recommended that if MCL 769.3 does not apply or an indigent defendant is acquitted of the charges or not placed on probation, reimbursement for court appointed attorney fees should not be ordered.

When costs are imposed under the Crime Victim's Rights Act, the court must consider the amount of loss sustained by any victim as a result of the offense. [MCL 780.767(1); MSA 28.1287(767)(1)]

There are no statewide models for reimbursing court appointed attorney fees.

In an unpublished opinion, People v Chandler, 2/08/00, the Court of Appeals indicated that a court cannot order a partially indigent person found not guilty to reimburse for the cost of legal advice, but only "contribute" to the cost.

2. Contribution Before Sentencing

In felony cases, as specified MCR 6.005(C) the court can order a partially indigent defendant to contribute toward the costs of defense under a specific plan. The purpose of MCR 6.005(C) is not to authorize reimbursement but to ensure that the defendant is not denied appointment of an attorney because of partial "ability to pay". This court rule does not apply to misdemeanor cases.

B. Condition of Probation

Payment of costs as a condition of probation is seen as reimbursement to the public and not as punishment [People v Teasdale, 355 Mich 1, 5-6; 55 NW2d 149 (1952)]. Therefore, statute allows a judge, without a hearing, to set an amount reflecting the costs "reasonably related to the expense of the prosecution" [People v Blanchura, 81 Mich App 399, 404; 265 NW2d 348 (1978)]

When reimbursement is a condition of probation, the court may only collect money for reimbursement while the probation order is in effect. Once a probationer is discharged from probation, further collection is prohibited. MCL 771.3(5)(a) states that "the court shall not require a probationer to pay costs unless the probationer is or will be able to pay them during the term of probation."

Probation may not be revoked for failure to pay costs if the reason for nonpayment is the defendant's indigency. [People v Terminelli, 68 Mich App 635; 243 NW2d 703 (1976); People v Lemon, 80 Mich App 737; 265 NW2d 31 (1978)]

See also Section 6-10 for details.

APPENDIX 3

Petition and Order for Court Appointed Attorney (MC 222)

Claim of Appeal (MC 55)

Bond on Appeal (MC 56)

Order of Transmittal/Certification of Records to Transmit Record on Appeal (MC 57)